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Supreme Court of the United States

OCTOBER TERM, 1941

No. 260

RALPH ELLIOTT SPRINKLE, *Petitioner*

vs.

MOSE E. DAVIS, *Respondent*

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner asks leave to make brief reply to Respondent's Brief, with the object of uncovering the fallacies and misconceptions therein.

Petitioner's supporting brief is replete with quotations from the testimony of plaintiff's (Respondent's) witnesses. It will be necessary, therefore, merely to refer to the appropriate pages of petitioner's supporting brief in order to sustain the contentions put forth under the following captions.

I

Respondent Predicates Every Argument Upon Evidence Which is Palpably False

Petitioner's whole case rests upon the postulate that the testimony of Davis and his witnesses is false upon its face; that the contention that Davis could not cross

a 20-foot road without being struck by Sprinkle's car, admittedly not in sight 670 feet away, with no obstruction to vision, when Davis started across, is manifestly an absurd contention; is a mathematically impossible contention; and that, therefore, it is not possible that the story of the accident as related by Davis and his witnesses can be a true story—and that the only other evidence in the case, Petitioner's evidence, namely, that Davis ran suddenly out from between the two trucks immediately into the path of Sprinkle's approaching car, and that Sprinkle suddenly applied his brakes and swerved to his left in an effort to avoid hitting Davis, is the only credible testimony in this case.

See Supporting Brief, pages 16 to 20, inc., and pages 26 to 29, inc.

II

Respondent Ignores His Own Evidence, Which Demonstrates that Davis Had to Walk Only 10 Feet While Sprinkle was Driving Over 670 Feet, in Order to Clear Sprinkle's Car

We refer to pages 32 to 34, inclusive, Petitioner's Supporting Brief.

Here petitioner sets forth in detail plaintiff's evidence, not petitioner's, to the effect that Sprinkle crossed the center line of this 20 foot road 50 to 60 feet west from the beginning of the skid marks; that the skid marks began just opposite a little hickory tree; that the hickory is 39 feet east of the rear edge of the truck, being point B on Respondent's map, and being the point at which Respondent contends Davis entered the road.

In other words, Petitioner demonstrated from plaintiff's evidence, above referred to, that Davis entered the highway from *11 to 20 feet east of the point where the skid marks made by Sprinkle's car crossed the center line of the highway,* and that therefore (as Sprinkle's car was in his right lane of this 20-foot highway when it

passed the point where Davis started across) Davis had to walk only 10 feet, the width of this right lane, *in order to clear the path of a car not in sight 670 feet away when he started across.*

The reply brief of Respondent may be searched from cover to cover without finding any answer to, or even any reference to, these undisputed facts *proved by Respondent's own witnesses.*

Why could not Davis walk 10 feet to safety while Sprinkle's car, according to plaintiff's undisputed evidence, was coming a distance of more than 670 feet?

III

Respondent says (his brief, p. 1):

> *"The body of the brief in support of the petition is given over to a few narrow quotations from part of the testimony of part of the witnesses."*

Petitioner challenges the accuracy of the above quoted statement. When Petitioner quotes the very words of the plaintiff, Davis (Supporting Brief, p. 16), giving every detail as to how he crossed this highway, and what he did immediately before crossing, is this a "narrow quotation"?

Is this a "narrow quotation from part of the testimony" of this witness? If so, why did not Respondent give in his brief the broad quotation? And if petitioner quoted only part of the testimony of the plaintiff, why did not Respondent give the *other part of the plaintiff's testimony?*

And petitioner quotes from the testimony of Edward Carter (Supporting Brief, pages 16 and 17), and from the testimony of Thomas Carter (Id. p. 17) and from the testimony of F. T. Shelton (Id. p. 17), all plaintiff's witnesses, and all eye witnesses of the accident.

If petitioner did not quote accurately, or all, of the pertinent testimony of these witnesses, why did not re-

spondent supplement the "narrow quotations" with broad and full quotations?

Likewise, petitioner quoted the testimony of Respondent's expert witness, an accredited engineer, C. B. Malcolm (Supporting Brief, pages 19, 20, 26, 27 and 28). If any part of the testimony of this frank and favorable witness was suppressed, why did not respondent himself quote such unquoted part?

RESPONDENT'S BRIEF MAY BE SEARCHED FROM THE FIRST PAGE TO THE LAST, AND NOT ONE WORD WILL BE FOUND, NOR ONE SENTENCE OF TESTIMONY PRODUCED, TO CONTRADICT THE WORDS OF THE RESPONDENT'S WITNESSES QUOTED IN PETITIONER'S SUPPORTING BRIEF.

This testimony stands unchallenged, and hence admitted. Petitioner respectfully urges that this Honorable Court, after reading plaintiff's own evidence, quoted in petitioner's Supporting Brief, may ask itself whether the accident could ever have happened if plaintiff and his witnesses have told the truth.

Petitioner, therefore, submits that the already quoted assertion in Respondent's brief (page 1) that "the body of the brief in support of the petition is given over to a few narrow quotations from part of the testimony of part of the witnesses," is an assertion which is at once indicative of excessive and unguarded forensic zeal, is not supported by a single fact found in the record, and can serve only as an example of like inaccuracies of statement which run through respondent's brief, but which, for lack of space, petitioner is unable to notice.

IV

On this same page (1) of Respondent's Brief, Petitioner is charged with having quoted the testimony only of

"Part of the Witnesses"

Petitioner respectfully asks: Where and who are the other part of the witnesses who saw Davis cross the road or who looked easterly just before he crossed? Has Respondent named them in his brief? *Not one.*

Petitioner asks leave to say that while he quoted all of the witnesses produced by plaintiff, there were in fact other witnesses whose testimony was not available to petitioner because *the plaintiff below did not see fit to produce them.*

Edward Carter (Supporting Brief, p. 40), when asked "Who else was on that truck besides Mose Davis, the truck you were on?" replied: "It was a good gang of us on there," including the plaintiff's brother, Preston Davis.

Thus it appears that the "part of the witnesses" not produced were, suspiciously, *the plaintiff's own brother,* and others who were riding in the same truck with the plaintiff, but whom he did not see fit to produce as witnesses (See Supporting Brief, pages 51, 52, and 53).

V

The Last Clear Chance Doctrine Has No Application

Respondent invokes the doctrine of last clear chance (Respondent's Brief, pages 13 to 17, inclusive). This doctrine assumes that Davis was in plain view of Sprinkle, that Sprinkle had the last clear opportunity to see Davis and to avoid the accident, even though Davis was negligent.

But Respondent is here *assuming the verity of the testimony of Davis and his witnesses*—a violent assumption under the facts set forth in the record.

Respondent overlooks petitioner's demonstration that the whole story of Davis is incredible, is an impossible story, is a fabrication which falls to pieces when tested by the mathematical certainties found in the testimony of Respondent's witness, Malcolm, hereinbefore cited.

If this be true, which is to say, if Davis, according to his own evidence, could have walked 10 feet, out of the path of Sprinkle's car, more than 670 feet away, before Sprinkle could have reached him (Davis) or, even could have walked entirely across the 20-foot road before Sprinkle could have reached him, then Davis *did not in fact cross the road from the point where he and his witnesses said he crossed,* but he ran out in front of Sprinkle's approaching car, from an obscured position between two trucks, as Sprinkle says he did.

Therefore, Sprinkle had no chance to see Davis—*and the last clear chance theory vanishes,* leaving the negligence of Davis in violating Section 2154 (126) (d) of the Code of Virginia, which prohibits a pedestrian from stepping into a road from an obscured position, as the proximate cause of the accident.

VI

Respondent Likewise Ignores the Contradictions of Himself and His Witnesses, Which Prove Nothing Short of Mendacity

We have but to refer to pages 35 to 40, inclusive, of petitioner's supporting brief. It is more than significant that not one of these contradictions is denied; indeed, not even referred to, in Respondent's Brief.

Do they not utterly destroy the moral force of Respondent's case? Davis, at the first trial, testified that he crossed the road diagonally, while at the third trial Davis declared that he crossed the road practically at right angles, that his dinner bucket "was pretty near level with the back end of the truck" (Petitioner's Supporting Brief, bot. p. 36).

Akers, a foreman, and perhaps the most zealous witness for Davis, admits at the first trial that he first saw and heard Sprinkle's car when it was 350 feet away from Davis. Akers admits at the second trial that when he

first saw Sprinkle's car, "it was right on top of Mose Davis." But at the third trial, Akers reverts to his testimony at the first trial and says that when he first saw the car "it was approximately 350 feet away" (Supporting Brief, p. 37).

Again, at the third trial, Akers says that when he heard the roaring of Sprinkle's car he ran to the front end of the truck. But Overstreet, also plaintiff's witness, the driver of the truck in which Akers (seated beside Overstreet) was riding, says that Akers did not run to the front of the truck, but that at the time of the accident: "Mr. Akers was in the cab with me, and when he was getting out the accident took place. He had both feet on the ground and one hand on the door." (Supporting Brief, p. 38.)

Petitioner respectfully inquires whether this Honorable Court will pay any heed whatever to the testimony of the plaintiff and of his chief witness, Akers, when each unblushingly reverses his testimony to suit what he conceives to be the exigencies of the particular occasion.

It will be remembered that the learned Circuit Court of Appeals reversed the District Court on the first appeal upon the ground that Davis was walking diagonally across the road (*Sprinkle* v. *Davis*, 104 F. 2d. (487)). Manifestly, Davis altered his testimony from a diagonal crossing to a rectangular crossing because of this reversal.

Why Akers at the first trial saw Sprinkle's car 350 feet away and at the second trial did not see it until it was right on top of Mose Davis, we do not know. But this is his testimony.

Are not both of these witnesses utterly discredited and unworthy of belief?

VII

Respondent Strains at a Gnat and Swallows a Camel

Petitioner notes that Respondent concludes his brief with a somewhat perfervid argumentum ad hominem which begins: "To support this unworthy Petition the shocking assertion is made that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an extension of this court's power of supervision."

Respondent seems not to have thought it necessary to quote the entire language used by petitioner in his Petition for certiorari (Petition, p. 8, IV (c)) where petitioner said:

> "The Circuit Court of Appeals has in effect, *though not in intent* (italics supplied) so far departed from the accepted and usual course of judicial proceedings as to call for an extension of this Court's power of supervision."

Petitioner has sought to present his case directly and sincerely, though always with deference and respect for the probity of the learned court appealed from. But petitioner has preferred to employ honest and direct language, rather than weasel words, with which to make his points.

Petitioner has taken exception to the proceedings (not to the purposes) of the lower courts, both the District Court and the Circuit Court of Appeals. For the exceptions to the proceedings in the District Court it will suffice to refer to the opinion in the case of *Sprinkle* v. *Davis*, 111 Fed. 2d. (925), where it will be found that petitioner's exceptions were sustained and that the District Court was reversed by the Circuit Court of Appeals. For the exceptions taken to the action of the learned Circuit Court of Appeals it is only necessary to refer to petitioner's petition for rehearing, found in the record (pp. 41-57, vol. 2).

Petitioner has believed what he has said and he has said in plain words what he has believed. But what of the position of Respondent, who has thus sought by a half statement of the facts to prejudice petitioner before this Honorable Court?

This same Respondent, petitioner finds it necessary to say, has strained at gnats and has swallowed camels. This same Respondent proclaims petitioner's plea for justice "unworthy" and "shocking." But where in Respondent's Brief is there one word which indicates that the unblushing falsehoods of Respondent and of his most important witnesses are "unworthy," or that Respondent's hurdling of these falsehoods without comment is "shocking"?

Conclusion

Petitioner's case is, like petitioner himself, humble and unpretentious, in comparison with the cases with which this most Honorable Court commonly deals, cases which involve mighty constitutional questions and vast amounts measured in money. But petitioner has been taught to believe, and does believe, that this Honorable Court not only looks high above, but bends low beneath, to find justice, and to do justice to the humble as well as to the great.

Petitioner honestly believes that the learned Circuit Court of Appeals has honestly erred. And he submits his grievances, asking only that the record and the briefs be searched for the truth.

Respectfully,

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